

Didiwick (Migration) [2019] AATA 2924 (21 June 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Soliey Celestine Didiwik
CASE NUMBER:	1732156
DIBP REFERENCE(S):	BCC2017/2957606
MEMBER:	Kira Raif
DATE:	21 June 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass (155) (Five Year Resident Return) visa.

Statement made on 21 June 2019 at 11:59am

CATCHWORDS

MIGRATION – cancellation – Return (Residence) (Class BB) visa – Subclass 155 (Five Year Resident Return) – ground for cancellation – bogus document – birth certificate – issued by the PNG Birth Registry – correct date of birth unknown – ‘obtained because of a false or misleading statement’ – incorrect information in previous visa application – relation to claimed daughter – no distinction between biological child and adopted child in application form – consideration of discretion – grant of visa based partly on bogus document – unlikely to adversely affect applicant’s eligibility – length of time since non-compliance – contribution to the community – primary source of financial support to family – best interest of children – eligibility for another visa – unintentional breach – decision under review set aside

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5, 5CA, 101, 103, 107, 107A, 109
Migration Regulations 1994 (Cth), r 2.41

CASES

MIAC v Khadgi (2010) 190 FCR 248

STATEMENT OF DECISION AND REASONS

Application for review

2. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass (155) (Five Year Resident Return) visa under s.109(1) of the *Migration Act 1958* (the Act).
3. The applicant is a national of Papua New Guinea (PNG) born in April 1974. He was granted the Class VE Skilled Sponsored visa in December 2009 and a Resident Return Visa (RRV) in March 2015. On 23 August 2017 the applicant was issued with the Notice of Intention to Consider Cancellation (NOICC) because the delegate formed the view that the applicant did not comply with s.101 and s.103 of the Act. The applicant provided his response and his visa was cancelled on 18 December 2018. The applicant seeks review of that decision.
4. The applicant appeared before the Tribunal on 19 June 2019 to give evidence and present arguments. Several other witnesses were available to give oral evidence to the Tribunal but the Tribunal determined it was not necessary. The applicant was represented in relation to the review by his registered migration agent. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

Relevant law

5. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
6. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise.
7. Section 107A provides that possible non-compliance in connection with a previous visa may be grounds for cancellation of the current visa.

Did the notice comply with the requirements in s.107?

8. Section 107 is only engaged if the Minister or delegate considers that the visa holder has not complied with one of the provisions mentioned in s.107(1). It is only then that the Minister or delegate is entitled to give notice to the visa holder under s.107. Therefore, if a notice is to be given under s.107, the Minister or delegate must have reached a state of mind where they consider that the visa holder has not complied with one or more of the relevant provisions.
9. The Tribunal has considered the validity of the NOICC. The Tribunal is satisfied that it contains sufficient particulars to enable the applicant to identify and address the issues and also that the delegate had reached the necessary state of mind to engage s.107. The Tribunal is satisfied that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

10. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with ss.101 and 103 of the Act.
11. The applicant provided to the Tribunal a copy of the primary decision which contains the following information:
 - a. On 6 April 2009 the applicant applied for the Class VE Subclass 176 Skilled Sponsored visa.
 - b. In the application form, in relation to his family members, the applicant stated that McKlyne Didiwik, born in September 1993, was his child and his dependent.
 - c. The applicant submitted with the application a PNG birth certificate for McKlyne Didiwik. It lists the applicant as the father and his wife Julie Poyou as the child's mother. The same birth certificate was submitted in support of the earlier Subclass 457 visa application lodged in 2007.
 - d. In May 2016 the Department received information that McKlyne Didiwik was not the applicant's daughter but a daughter of one of his friends. Her genuine identity was McLeen Winiawi and she was born in August 1986. It was alleged that the applicant's motivation for bringing McKlyne Didiwik to Australia was for her to undertake duties as a domestic servant and her birth certificate was fraudulently obtained.
12. In his written response to the NOICC the applicant concedes, in relation to s.103, that the birth certificate had incorrect information. The applicant states that McKlyne did not have a birth certificate until the family was arranging migration to Australia. He states that he had asked his sister to obtain the birth certificate and she did not know the correct date of birth, so chose one. The applicant states that although he knew that the birth certificate had an incorrect date of birth, he 'did not think much' of it because it was validly issued by the Registry. The applicant subsequently provided to the Tribunal a declaration from his sister who outlines the circumstances in which the child was named and her birth record issued.
13. The applicant also states, in relation to s.101, that he correctly identified McKlyne as his dependent child because he had customarily adopted her according to PNG traditions and customary adoptions are accepted under the migration law. The applicant provided a number of statements and other evidence concerning customary adoptions in PNG and notes that under s.5CA of the Act, a child includes an adopted child. He claims that McKlyne has been part of his family since childhood and has been treated as his child, with emotional and financial support being provided to her. The applicant states that McKlyne had been living as his daughter prior to the application and there was no distinction between adopted child and biological child on the application form. The Tribunal considers that evidence unsatisfactory. All the information provided by the applicant in the application, including the information on the form and in the enclosed birth certificate, identifies the applicant as the parent of McKlyne. There is nothing in the application that indicates that he is not a biological parent but an adoptive parent, as he claims. By failing to disclose that information, coupled with the absence of evidence of customary adoption with the application, the applicant sought to mislead the decision-maker by claiming to be the biological father of the child.

14. In oral evidence, the applicant told the Tribunal that when they were required to obtain the birth certificate for migration purposes, neither he nor his wife were available, so his sister approached the Birth Registry and filled in the papers. Because the date of birth is not normally recorded, they did not know McKlyne's exact date of birth. The applicant explained that there are no birth records in PNG and the information was not available, so his sister came up with the date for McKlyne because they do not know the real date of birth. In relation to being identified as the birth parent of McKlyne, the applicant said that it is not customary to refer to a child as a biological or an adopted child. When the birth was registered, because the child was an adopted child, the Registry informed them that an adopted child could be recorded as a biological child.
15. The Tribunal finds that McKlyne's birth certificate presented with the application was a bogus document within the meaning of s.5(1)(c) of the Act because it was obtained because of a false or misleading statement. The Tribunal finds that the applicant gave, presented or produced, to an officer or the Minister, a bogus document or caused such a document to be so given, presented, produced or provided. The Tribunal finds that the applicant did not comply with s.103 of the Act.
16. In relation to the breach of s.101, the Tribunal is mindful that the application form does not appear to distinguish between a biological child and an adopted child. It required the applicant to list his children. As the applicant believed McKlyne to be an adopted child, he referred to her as a child in the application form. The Tribunal is not satisfied that a breach of s.101 is established.
17. The Tribunal finds that there was non-compliance with s.103 by the applicant in the way described in the s.107 notice.

Should the visa be cancelled?

18. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).
19. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are:

The correct information

20. The correct information is that the applicant is not the biological father of McKlyne. The correct information relating to the child's identity would have a different name and date of birth.

The content of the genuine document (if any)

21. The Tribunal found the child's birth certificate to be a bogus document. The content of the genuine document would identify different parents and a different date of birth.

Whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document

22. The applicant argues in his response to the NOICC that the incorrect information or bogus document would not have had an effect on the grant of the visa and would have more likely

had an effect on McKlyne's eligibility for the visa. The applicant states that if issues had been raised about McKlyne's dependency, the family would have decided whether to withdraw her application and the other applications would have progressed.

23. The Tribunal notes that there are several provisions relevant to the grant of the Subclass 176 Skilled visa that would have relied on the bogus document. Information about an applicant's identity is relevant in assessing the character criteria in Schedule 4 (eg PIC 4001) and the Special Return criteria. A secondary applicant's age would have been relevant in assessing whether she was a dependent of the primary visa applicant (eg cl.176.311 and cl.176.321). Her relationship with the primary visa applicant would have been relevant in assessing whether she is a dependent child, and a member of the family unit, of the primary visa applicant (cl.176.311 and cl.176.321).
24. The applicant submits that the decision to grant the visa to him and his partner and other children would have been unaffected. However, it is not necessary for the Tribunal to determine whether the visa would have been granted, if the correct information was known. The Tribunal finds that the decision to grant the visa was based, at least partly, on the bogus document.

The circumstances in which the non-compliance occurred

25. The applicant claims that he had customarily adopted the child and considered her to be a child and for that reason included her as his dependent child when making the application. The Tribunal is mindful that the child's birth certificate expressly refers to the applicant and his partner as the biological parents of the child.
26. The applicant's evidence to the Tribunal is that there are no birth records in PNG and the papers were only obtained when the migration paperwork was required. The applicant's evidence is that the child was adopted at the time of birth or soon after due to family responsibilities. At the time when the documents were needed, he asked his sister to approach the registry to obtain the birth certificate. He was not thinking about these things because he knew that this child was his child and he had been supporting her from birth. The applicant said that he had little knowledge about the paperwork and immigration as Australia was his first overseas trip. He claims that he did not see the birth certificate as a bogus document. When he filed the papers, he was not thinking about the migration laws and he was relying on the cultural things. The applicant appears to have little appreciation of the breach.

The present circumstances of the visa holder

27. The applicant outlined his circumstances in his written response to the NOICC. The applicant states that he has been living in Australia for many years and has been employed for over 11 years as an auto-electrician. The applicant presented to the delegate evidence of employment and a statement from his employer. The applicant presented an employment reference and evidence of his employment to the Tribunal. He explained the nature of his position and states that his employer does not want to lose him and that is supported by the employer. The Tribunal accepts that evidence.
28. The applicant states that he has four minor children who have grown up in Australia or were born in Australia. The applicant told the Tribunal that his wife and three children are permanent residents and his youngest child is an Australian citizen. The applicant confirmed that he may be eligible to apply for a Partner visa although there may be uncertainty in relation to that application.

29. The applicant states that his children, aged 13, 12 and 2 had spent most of their formative years in Australia and his youngest child was born in Australia and is an Australian citizen. The family are engaged in church activities and the children are doing well at school. The applicant spoke about his community work in oral evidence to the Tribunal. The Tribunal accepts that evidence.
30. The applicant presented evidence of having purchased a house in Perth and he states that he is involved in community activities. The applicant told the Tribunal that he owns two properties, one residential and one investment property. His wife is doing a full-time university course in nursing and plans to work in remote communities after the course is completed. The Tribunal accepts that evidence and accepts that the applicant is the primary source of financial support to the family.
31. The applicant presented a number of character references and statements from community members. He states that he is integrated into Australian society and is recognised as a leader within the local PNG community in Perth. The Tribunal accepts that evidence and accepts that the applicant has been actively engaged in community activities and that he is well regarded by others. The Tribunal accepts that the applicant is well settled in Australia. The applicant also claims that he is of good character and has looked after McKlyne.

The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act

32. Nothing adverse is known about the applicant's behaviour concerning his obligations under the Act.

Any other instances of non-compliance by the visa holder known to the Minister

33. The primary decision record indicates that the applicant made the application for the Subclass 457 visa in which he provided the same incorrect information and the same bogus document. That would indicate another instance of non-compliance with s.103 of the Act in relation to the Subclass 457 visa application made in 2007.

The time that has elapsed since the non-compliance

34. The application for the Skilled visa was made in April 2009. More than 10 years have passed since the non-compliance.

Any breaches of the law since the non-compliance and the seriousness of those breaches

35. There are no known breaches of the law.

Any contribution made by the holder to the community

36. The applicant provided evidence of his involvement in community activities. He states that he is actively involved with the PNG community in Perth and was previously a Vice-President of a community organisation and continues to be involved with its activities. The applicant provided a number of statements concerning his community involvement and the Tribunal accepts that evidence. The applicant also refers to his employment. The Tribunal accepts that the applicant has been gainfully employed and contributes to the community through the payment of taxes.
37. The applicant's evidence to the Tribunal is that he wants to take the charity work to 'the next level'. He has registered a charitable organisation and wants to be more involved in charity work.

38. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedures Advice Manual PAM3 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.

Whether there are mandatory legal consequences, such as whether cancellation would result in the visa holder being unlawful and subject to detention, or whether indefinite detention is a possible consequence of cancellation, or whether there are provisions in the Act which prevent the person from making a valid visa application without the Minister's intervention

39. If the applicant's visa is cancelled, unless he is granted another visa, the applicant would be an unlawful non-citizen and may be detained. There is no suggestion that he will be detained indefinitely. The Tribunal acknowledges that unless the applicant is granted another visa, he may be an unlawful non-citizen and subject to detention and possible removal from Australia. There may be restrictions on the applicant's future travel and future visa applications as a consequence of the cancellation. There are no provisions in the Act which prevent the applicants from making a valid visa application without the Minister's intervention although the Tribunal acknowledges that the applicant will have limited opportunities to make visa applications onshore.

Whether there would be consequential cancellations under s.140

40. The applicant's partner and children were included in the same Skilled visa application but have since been granted the Resident Return visas. The applicant told the Tribunal that there has been no action taken to cancel their visas.

Whether any international obligations would be breached as a result of the cancellation, such as non-refoulement obligations, family unity principles or the obligation to consider the best interests of the child

41. The applicant has four minor children in Australia. The applicant's evidence to the Tribunal is that the children are attending private schools and have chosen their career paths. He provides them with financial and other support. The Tribunal accepts that it is in the best interests of the four minor children to remain with their father. The Tribunal is mindful, however, that the applicant may be entitled to apply for, and be granted, a Partner visa which would enable the applicant to remain in Australia with his children. The Tribunal acknowledges the applicant's evidence that one cannot be absolutely confident about the grant of such a visa and the uncertainty relating to the visa process may cause hardship to the family and the children. The Tribunal accepts that this is so but given the applicant's evidence concerning his relationship with his partner, it appears that the applicant may be eligible for the grant of such a visa. If granted a visa, the applicant would be able to continue to reside in Australia with his family. Because of that, the Tribunal does not consider that the best interests of the children would be adversely affected by the cancellation of the visa.
42. The applicant told the Tribunal that he gave up most of his belongings in PNG to support himself and the family. The Tribunal is not satisfied that these matters give rise to Australia's protection obligations but if the applicant believes such matters exist, the applicant has the opportunity to apply for a protection visa where such claims would be assessed.

Any other relevant matters, including the degree of hardship that may be caused to the visa holder and any family members

43. The applicant told the Tribunal that he has been law-abiding since he arrived in Australia and has not done anything wrong. He has contributed to the community and has been involved in various activities. He contributes to his employer and provides support to his work colleagues and he feels that the community and his employer need him. His wife and children also need him.
44. The Tribunal has considered the totality of the applicant's circumstances. The Tribunal has formed the view that the birth certificate for McKlyne was a bogus document because it was obtained because of a false or misleading statement and that the applicant breached s.103 of the Act and there are grounds for cancelling the visa.
45. The Tribunal has found that the grant of the visa was based, in part, on the bogus document because there are several criteria that would have been relevant to McKlyne's identity and membership of the family unit. However, the Tribunal has formed the view that the provision of the bogus document is unlikely to have resulted in the adverse visa outcome for the applicant. An adopted child could be included in the application, although the child would have been required to meet additional criteria relevant to adoption and if such criteria were not met, it is likely that the child would have been refused the visa but not necessarily the applicant. That is, the provision of a bogus document need not have resulted in the visa being refused.
46. There are no other known instances of non-compliance or breaches of the law. Ten years have passed since the non-compliance, which is a lengthy period. The Tribunal accepts that the applicant has made a significant contribution to the community and the Tribunal also accepts that the applicant is the main source of financial support to his partner and children. The Tribunal has formed the view that the best interests of the children would not be adversely affected by the cancellation of the visa because the applicant may be eligible to be granted another visa, but the Tribunal accepts the applicant's claims that there may be some hardship associated with the uncertainty of a new visa application.
47. The Tribunal also accepts the applicant's evidence that the bogus birth certificate was obtained because the correct information about the child's date of birth was not known and also because he believed that as an adoptive parent, he could be named as the parent on the birth certificate. While the Tribunal is of the view that the applicant should have taken greater care in obtaining the document and checking the document before its submission to the Department, the Tribunal is prepared to give the applicant the benefit of the doubt that the breach was not intentional.
48. Ultimately, the Tribunal places greater weight on the circumstances in which the non-compliance occurred, the length of time that has passed since the non-compliance and the degree of the family's settlement in Australia, as well as the fact that the provision of a bogus document is unlikely to have affected the applicant's eligibility for the visa. In the Tribunal's view, these factors, which are favourable to the applicant, outweigh other considerations.
49. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should not be cancelled.

DECISION

50. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass (155) (Five Year Resident Return) visa.

Kira Raif
Senior Member